Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-539

D. DOYLE MIZE AND THE ADDIS CORPORATION,
Petitioners,

v.

STELLA DARROW, ET AL,
Respondents,

SOUTHDOWN, INC., A CORPORATION, ET AL,
Respondents,

D. DOYLE MIZE AND THE ADDIS CORPORATION,
Petitioners,

v.

CHARLES F. SPALDING, ET AL,
Respondents,

SOUTHDOWN, INC., A CORPORATION, ET AL,
Respondents.

PETITIONERS' REPLY BRIEF TO BRIEF IN OPPOSITION OF RESPONDENTS SOUTHDOWN, INC. AND CHARLES F. SPALDING, ET AL

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Statutes and Rules	1
Statement of the Case	1
Question Presented	1
Argument	2
Conclusion	4
Certificate of Service	5

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OPINIONS BELOW, JURISDICTION, STATUTES AND RULES, AND STATEMENT OF THE CASE are set out in full in Petitioners' Original Petition to this Court; given the limited scope of this Reply Brief, they will not be repeated here.

QUESTION PRESENTED

May a holder of securities in a corporation be denied standing to object to a settlement agreement in a shareholders' class action/derivative suit unless such security

holder demonstrates that he would have had standing to initiate and prosecute such class action/derivative suit?

ARGUMENT

This Reply Brief is filed pursuant to Rule 24(4) of the Rules of this Court and is limited in scope, as that Rule requires, to refutation of arguments first raised in Respondents' Brief in Opposition. It is intended only to address certain inaccuracies raised in Respondents' Brief in Opposition. In all respects, Petitioners stand on the argument and authorities set forth in the Petition and are prepared to expand upon them should this Court grant certiorari.

By misstating the relationship of the Petitioners to the underlying class actions/derivative suits and the essence of their objections to the settlement agreements approved by the Judgments of the district courts below, Respondents have attempted to distort the issue presented in this case as it now stands before this Court. The present issue, clear and simple, is one of standing. The *merits* of neither the underlying suit nor of the settlement orders are before this Court for consideration on this Petition. This remains true despite the determined efforts of Respondents to confuse the issue with prejudicial and disparaging commentary on the cornucopia of litigation engendered by the transactions involved in the underlying suit in this case. (*E.g.*, Respondents' Brief in Opposition, hereinafter "Br." at 4 n.1.) Stated in simplest terms, what Petitioners seek from this Court is reversal of the Fifth Circuit's holding that Petitioners lacked standing to object to the settlement orders entered by the district courts, and a remand to the Fifth Circuit for consideration of the merits of their objections to those settlement orders. Accordingly, Petitioners insist that the merits of the underlying suit should be left for another day and consequently have no place in Respondents' Brief in Opposition. With this in mind, Petitioners now address themselves to a refutation of the misstatements Respondents have included in their Brief in Opposition.

In their "Statement of the Case", Respondents refer, Br. 4, to "wrongful profits which Mize and his cohorts received from the [Valhi] spin-off". Petitioners object most strongly to this misrepresentation of the facts. Nowhere in the record of this case, nor in the records of the multiple litigation cited at Br. 4 n. 1, is there any factual basis for such an allegation. In fact, the record in the Courts below reveal that neither Petitioner received one cent from the spin-off.

Through an exercise in semantics, Respondents have attempted at Br. 6 to assert that the Fifth Circuit did not do what it in fact did do when this case was before it. Picking up on the phraseology of the opinion, and ignoring its substance, Respondents emphasize that the Fifth Circuit used the words "on principles *akin* to standing" (emphasis added by Respondents, not in original) in holding as it did in this case. Br. 6, quoting 574 F.2d at 1336. On this ephemeral basis, Respondents have attempted to construct the proposition that "the issue of standing, which Petitioners have so broadly presented, is not properly before the Court." Br. 6.

Petitioners submit that no word is a talisman, and that whether it did so on "principles of standing" or on "principles *akin* to standing", the Fifth Circuit in its decision below held that "Mize and Addis cannot object to the settlement." 574 F.2d at 1336. It is the essential reasoning of the Fifth Circuit's opinion, and not its diction, which Petitioners seek to have reviewed by this Court. That the Fifth Circuit refused to hear the merits of Petitioners' objections to the settlement order in this case is the *raison*

d'etre of this Petition. Therefore, it is irrelevant whether or not the Court of Appeals held "that standing to object to the settlement of a derivative claim is *in all cases* dependent on the objector's standing to have brought the suit in the first place," Br. 7 (emphasis added), since, indisputably, that was its clear holding in *this* case. 574 F.2d at 1336, 1337, 1338.

Respondents seem to suggest, in a stark misstatement of the opinion below, that the Fifth Circuit actually did determine the merits of Petitioners' objections to the settlement orders of the district courts. Br. 6, 9. Petitioners need only direct this Court's attention to the actual opinion itself, rather than to Respondents' imaginative reconstruction of it, to refute this suggestion.

E.g.:

> We measure Mize's ability to object to the settlement agreement as a stockholder appealing on behalf of Southdown and its shareholders by asking whether he could have brought a derivative action in the first instance.

574 F.2d at 1336.

> We hold that the tenuousness of the harm to Southdown that Mize asserts on this appeal, in comparison to his own exposure to substantial personal liability in the continuing litigation, requires us to affirm the District Court's approval of the settlement agreement.

574 F.2d at 1337.

Petitioners submit that the error of the Court of Appeals' holding is apparent on its face and again request this Court to grant the opportunity to correct that error of law.

CONCLUSION

For the foregoing reasons, and for the reasons set out in Petitioners' Petition for a Writ of Certiorari, Petitioners pray this Court grant the Writ sought, bringing the case up for review by this Court.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that on the 22 day of Nov, 1978, a true and correct copy of the above and foregoing Reply Brief of Petitioners D. Doyle Mize and The Addis Corporation was served upon the individuals listed below by placing same in the United States mail postage prepaid, sent certified mail, return receipt requested, and addressed to the following:

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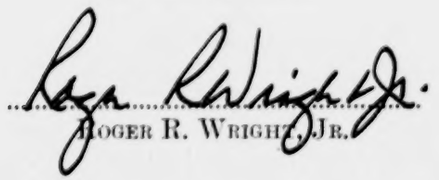

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